Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1998

GRACIELA JIMENEZ ARAGON,

Petitioner

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to he
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ARTURO C. GONZALEZ
GONZALEZ, GONZALEZ,& GONZALEZ
313 Pecan Street
Del Rio, Texas 78840
Telephone: (830) 775-4660
Telefax: (830) 775-5465

Attorney for Petitioner

33 pp

QUESTIONS PRESENTED

1. Whether Petitioner had standing to assert an interest in and to the real estate and contest the Government's forfeiture proceeding.

2. Whether the Court violated Petitioner's constitutional rights under the Due Process Clause of the 14th Amendment of the United States Constitution by Granting a Summary Judgment relying on evidence adduced at the criminal trial to which Petitioner was not a party or permitted to contest the forfeiture proceeding.

3. Whether the Court erred in not granting Petitioner a hearing previously set by the Court for July 29, 1997 at 2:00 p.m., thereby not permitting Petitioner to present proof of her legal and rightful claim to the real estate, the subject of this litigation.

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United States of America v. William J. Reckmeyer, 836 Federal Reporter, 2d Series 200-206 (4th 1987) 4

Statutes Cited:

Title 21 U.S.C.A. § 853(n) 1

Title 28 U.S.C.A § 1254(l) 1

Rule Cited:

Texas Probate Code § 38 5

Other Authorities Cited:

The Due Process Clause of the 14th Amendment of the United States Constitution 1

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reproduced at pp. 1a-2a of the Appendix. The Motion for Extraordinary Relief for Extension of Time to File Petition for Rehearing is reproduced at pp. 3a-6a of the Appendix. The Order of the United States Court of Appeals for the Fifth Circuit filed on August 31, 1998 is reproduced at p. 7a of the Appendix. Title 28 U.S.C.A. § 1254(1) is produced at p. 8a of the Appendix. Title 21 U.S.C.A. § 853(n) is produced at pp. 9a-10a of the Appendix. The Order of the United States District Court for the Western District of Texas, Austin Division filed July 28, 1997 is reproduced at pp. 11a-21a of the Appendix. Section 38, Texas Probate Code is produced at p. 22a of the Appendix. T.J.P. 3d § 164, Vol. 72 is produced at p. 23a of the Appendix.

STATEMENT OF JURISDICTION

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit was filed on August 17, 1998. Petitioner filed a Motion Requesting an Extension of Time to September 30, 1998, within which to file her Petition for Rehearing. However, a Petition for Rehearing was never filed. Therefore, the jurisdiction of this Court is involved under Title 28 U.S.C.A. 1254(1). The reasons set out in Petitioner's motion continued and finally the President of the United States declared this entire area as a "Disaster Area".

STATUTES AND RULES INVOLVED

This case involves:

1. The Due Process Clause of the 14th Amendment of the United States Constitution; and

2. Title 21 U.S.C.A. § 853(n).

STATEMENT OF THE CASE

In Criminal Case No. A-95-CR-193-JN filed in the United States District Court for the Western District of Texas, Austin Division, styled U.S. of America v. Alvaro Narviz-Guerra and Larry Austin Grant, Defendants were tried and convicted in a nine (9) count indictment. Subsequently, under superseding indictment, the Court entered a Preliminary Judgment of Forfeiture and seized Petitioner, Graciela Jimenez Aragon's property known as Las Moras Ranch, claiming the jury had found that the real estate, in fact, belonged to Defendants.

Petitioner is 21 years of age, and a resident of Tepic, State of Nayarit, Mexico which is approximately 900 miles from Maverick County, Texas where the Las Moras Ranch, the property the subject of this litigation, is located.

Petitioner was not a party to that litigation directly or indirectly, and in no way participated in the trial thereof. In fact, she did not know that Defendants were being tried and that the property had been forfeited by the Government until she received a NOTICE from the U.S. Government. Petitioner timely filed her affidavit claiming "innocent ownership"; that the property was the property of her father and mother but was purchased in the name of Francisco Garcia Velazquez who lives in Tepic, Nayarit, Republic of Mexico. Petitioner's father, Jaime Alberto Jimenez Azcona, who died intestate on April 12, 1994, and mother, Graciela del Carmen Aragon Mestas, who died on July 14, 1994 also lived in Tepic Nayarit, Republic of Mexico.

Petitioner claims ownership of the property for herself and four (4) minor brothers because her father and mother used legitimate funds from their ranching and cattle business operation in Mexico, but placed the Las Moras Ranch in the name of Francisco Garcia Velazquez to secure the payment of the Three Hundred Thousand ($300,000) Peso (Mexican currency) which her father and mother paid to Francisco Garcia Velazquez and having received an authenticated receipt which has been made available to the Government in both English and Spanish. Said receipt has been legally authenticated under the terms and conditions of

the HAGUE CONVENTION. Petitioner therefore, claims not only as an innocent owner because her father and mother paid Francisco Garcia Velazquez the Three Hundred Thousand ($300,000) Pesos (Mexican currency), but, also by having obtained legal title to the property by inheritance from her father and mother.

Petitioner claims that upon a hearing, she would be able to produce evidence showing that originally, her father participated in the acquisition of the Las Moras Ranch and will present proof that her father and mother paid, out of their legitimate funds, the monthly and final payments for the purchase of said ranch.

REASONS FOR GRANTING THE WRIT

There are two (2) strong compelling reasons regarding **"Standing"** and **"Violation of Petitioner's Constitutional Rights"** why a Writ of Certiorari should be granted. The unpublished opinion of the Fifth Circuit Court of Appeals in this case is in conflict and contrary to former opinions of this same Court regarding **"Standing"**.

The **"Violation of Petitioner's Constitutional Rights"** in not permitting Petitioner an Evidentiary Hearing is in conflict and contrary to other U.S. Court of Appeals and U.S. Supreme Court decisions.

Standing

United States of America v. One Parcel of Real Property, 831 F.2d 566-568 (5th 1987).

United States v. $38,570 U.S. Currency, 950 F.2d 1108-1113 (5th Cir. 1992)

In U.S. v. One Parcel of Real Property, supra, this Court said:

> "We have already considered the matter of standing to contest a governmental forfeiture under other statutes. In each case, we held that the ownership interest gives standing. *See e.g., United States v. One 18th Century*

> *Colombian Monstrance, 797 F.2d 1370, 1375 (5th Cir. 1986)*, cert., denied, --U.S.--, 107 S.Ct. 1989, 95 L.Ed.2d 496 (1987) (standing requires claimant to establish an ownership interest in property forfeited under 18 U.S.C. § 545); *General Finance Corp. of Florida South v. United States*, 333 F.2d 681, 682 (5th Cir. 1964) (only an owner is entitled to set up a lack of forfeiture and to claim a remission or mitigation of the penalty under 49 U.S.C. § 782)." See also U.S. v. $38,570 U.S. Currency, 950 F.2d 1108 (5th Cir. 1992)."

Since the order of the District Court recognizes the claim made by Petitioner, the record shows that Petitioner took possession and control of the property containing over 500 acres of land, for which her father and mother paid over $400,000.00. Further, that Petitioner immediately began paying taxes, insuring the improvements, and renting the property. Petitioner need only show, by extrinsic evidence admissible at a hearing, that her interest was inherited long before the property became tainted, if it ever did. Neonex Intern. Limited v. Norris Grain Co. D.C.N.Y. 1972, 338 F.Supp. 845. Under such circumstances, a summary judgment is improper. American Cyanamid Co. v. Elizabeth Arden Sales Corp. D.C.N.Y. 1971, 331 F.Supp. 597.

Violation of Petitioner's Constitutional Rights

In United States of America v. William J. Reckmeyer, 836 Federal Reporter, 2d Series 200 - 206 (4th 1987) in similar situation the Court verbatim said:

> "Nothing in § 853(n) explicitly acknowledges the right of third parties to attack the validity of the forfeiture order by providing that a particular asset was not forfeitable under the terms of the statute. Serious due process questions would be raised, however, if third parties asserting an interest in forfeited assets were barred from challenging the validity of the forfeiture.

> The determination made at the Defendant's criminal trial that the property was subject to forfeiture cannot be considered binding on persons who were not only parties to the criminal action but were specifically barred from intervening. See 21 U.S.C. § 853(k) (Barring third parties from intervening in the criminal trial); Parklane Hosiery Co. vs. Shore, 439 U.S. 322, 327 N. 7, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979) (Citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d. 788 (1971)) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or privy and therefore, has never had an opportunity to be heard.")."

Hearing

The Trial Court refused to grant Petitioner an Evidentiary Hearing. At an Evidentiary Hearing, Petitioner will show, by admissible evidence, that her father and mother placed the title to the Las Moras Ranch in the name of Petitioner's uncle, Francisco Garcia-Velazquez. Petitioner and her minor brothers inherited from her father and mother pursuant to Section 38 of the Texas Probate Code which defines persons that would inherit upon intestacy. Under those circumstances, a **Resulting Trust** was created in favor of Petitioner and her minor brothers. T.J.P. 3d §164, Vol. 72 defines a **Resulting Trust**.

Under existing Supreme Court decision, Petitioner was entitled to an evidentiary hearing. See Fuentes v. Shevin 407 U.S. 67, 32 L.Ed. 2d 556, pp. 1983-1997 which states in part:

> "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." Coe v. Armour Fertilizer

> Works, 237 U.S. 413, 424, 35 S.Ct. 625, 629, 59 L.Ed. 1027. It is enough to invoke the procedural safe-guards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods."

In the Coe case cited in Fuentes, supra, at page 424-426, the Court said "The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. The soundness of this doctrine has repeatedly been recognized by this Court."

CONCLUSION

Petitioner simply requests that this Petition for Writ of Certiorari be granted, directing the U.S. District Court for the Western District of Texas, Austin Division to grant Petitioner an Evidentiary Hearing.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ARTURO C. GONZALEZ
Counsel of Record
GONZALEZ, GONZALEZ, & GONZALEZ
313 Pecan Street
Del Rio, Texas 78840
Telephone: (830) 775-4660
Telefax: (830) 775-5465

Attorney for Petitioner

APPENDIX A--OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 17, 1998

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50811
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ALVARO NARVIZ-GUERRA, et al.,

Defendants,

GRACIELA JIMENEZ ARAGON,

Claimant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(A-95-CR-193)

(August 17, 1998)

Before, DUHÉ, DEMOSS, and DENNIS, Circuit Judges.

PER CURIAM:[1]

---

[1] Pursuant to 5th CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under thelimited circumstances set forth in 5th CIR. R. 47.5.4.

Appendix A

Graciela Jimenez Aragon ("Aragon") appeals the dismissal of her third-party petition opposing the preliminary forfeiture order of Las Moras ranch. A jury entered the order after the trial and conviction of Alvaro Narviz Guerra and Larry Austin Grant on drug, money laundering, and conspiracy charges. Aragon argues that the district court erred in dismissing her petition for lack of standing, or alternatively, granting summary judgment. She also argues that the district court violated her right to due process by failing to hold an oral hearing, by considering evidence from the criminal trial, and by failing to stay the final order of forfeiture pending this appeal.

We have reviewed the record and the parties' briefs and affirm the district court's finding that Aragon could not survive a motion for summary judgment. Summary judgment requires a non-movant to support her claim with specific facts and to show a genuine issue of material fact exists. FED. R. CIV. PRO. 56(c); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (recognizing that general factual allegations may suffice to defeat a motion to dismiss for lack of standing, but specific facts must be shown to defeat a motion for summary judgment.) Here, Aragon has offered no proof in opposition to the motion other than her own speculation, heresay from unknown sources, and references to evidence not in the record. Therefore, she fails to support her claim of ownership with specific facts and to show that a genuine issue of material fact exists as to whether she has title and whether her parents had any interest in the property. Melton v. Teachers Ins. & Annuity Ass'n of America, 114 F.3d 557, 559 (5th Cir. 1997).

We do not address Aragon's remaining claims because her lack of standing renders them moot.

AFFIRMED.

APPENDIX B--MOTION FOR EXTRAORDINARY RELIEF FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50811

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ALVARO NARVIZ-GUERRA, et al,

Defendants,

GRACIELA JIMENEZ ARAGON,

Claimant-Appellant.

MOTION FOR EXTRAORDINARY RELIEF FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING

TO THE HONORABLE JUSTICES FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

COMES NOW Graciela Jimenez Aragon, as Claimant-Appellant in the above entitled and numbered cause, and petitionsf this court for extraordinary relief for extension of time to file her Petitionfor Rehearing in response to the Appellate Court's opinion entered of record on August 17, 1998, affirming the District Court's dismissal of Claimant-Appellant's third party petition opposing preliminary forfeiture order of Las Moras Ranch[1]. In consideration thereof, Claimant-Appellant asserts

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[1] Cause No. A-95-CR-195, US Dist. Court, Western District of Texas-Austin Division.

the following:

I. Time for Filing Petition for Rehearing.

Fed.R.App. P. 40-Petition for Rehearing, requires movant to file her petition for rehearing within 14 days after entry of judgment. Since the Appellate Court's opinion was entered on August 17, 1998, Claimant-Appellant would have to file her petition for rehearing by no later than August 31, 1998.

II. Extraordinary Relief Sought.

Claimant-Appellant seeks a Level 1 extension of time pursuant to FRAP 31.4.3.1, requesting the Appellate Court grant a 30 day extension from the original due date, or no later than Wednesday, September 30, 1998, to file her Petition for Rehearing.

III. Circustances Requiring Extraordinary Relief.

Cousel for Claimant-Appellant practices in Del Rio, Texas. It is common knowledge that the City of Del Rio, Texas, located on the banks of the Rio Grande and the San Felipe River, has been ravaged by severe flooding causing multipe deaths and massive destruction of property resulting from rain deluges of more than 24 inches over a 36 hour period.

Most communications to the city have been cut off, electrical power has yet to be restored in some areas of the city, there is no running water and the sewer system is inoperable. Some areas of the city remain inaccessible, and most able residents, as in the case of this firm's employees and staff, have been vigorously occupied in emergency relief and assistance efforts. Electrical power to counsel's offices was not restored until late Monday afternoon on August 24.

In all probability as a result of this natural catastrophe, counsel for Claimant-Appellant did not receive notification of the Appellate

Appendix B

Court's decision in this matter until late Monday afteroon, August 24, 1998. It was not until the morning of Wednesday, August 26, that counsel for Claimant-Appellant was able to obtain the assistnace of other counsel in Houston to contact the Appellate Court and inform the Clerk of these circumstances, and to assist in the filing of this Motion for Extraordinary Relief for Extension of time to file Claimant's Petition for Rehearing.

Telephone communications are dismal at best and counsel for Claimant-Appellant has been unable to contact opposing counsel as required under FRAP 31.4.1(b). Efforts are ongoing to assure that all other parties are contacted to determine if any party should oppose Claimant-Appellant's motion. Claimant-Appellant therefore requests ex-parte relief.

WHEREFORE, Claimant-Appellant moves this Honorable Court of Appeals consider the existing extraordinary circumstances presented, and after consideration thereof, grant such motion for extension of time to file her Petition for Reconsideration to be filed no later than September 30, 1998. Claimant-Appellant further moves for any and such other relief as may be deemed appropriate, at law and in equity.

Respectfully submitted,

/s/ Arturo J. Gonzalez by permission
Arturo C. Gonzalez
State Bar No. 08124000
GONZALEZ, GONZALEZ, & GONZALEZ
313 Pecan Street
Del Rio, Texas 78840
830-775-4660
830-775-5465 (facsimile)
Counsel for Claimant-Appellant
Graciela Jimenez Aragon

Appendix B

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Claimant-Appellant's Motion for Extraordinary Relief for Extension of Time to File Petition for Rehearing was sent to all counsel of record in this matter by certified mail-return receipt requested, on August 26, 1998.

/s/ Arturo J. Gonzalez by permission
Arturo C. Gonzalez

APPENDIX C--ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 31, 1998

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50811

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ALVARO NARVIZ-GUERRA, et al.,

Defendants,

GRACIELA JIMENEZ ARAGON,

Claimant-Appellant.

Appeal from the United States District Court
for the Western District of Texas, Austin

ORDER:

IT IS ORDERED that appellant's motion for an extension of thirty days, or, to and including September 30, 1998 to file her petition for rehearing is granted.

/s/ John M. Duhue, Jr.
JOHN M. DUHE[1], JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX D--TITLE 28 U.S.C.A. § 1254(1)

Courts of appeals; certorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of cerriorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

APPENDIX E--TITLE 21 U.S.C.A. § 853(n)

Third Party Interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice of his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be sighed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The Unites States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of

forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that --

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the Unites States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

APPENDIX F--ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION FILED JULY 28, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	
	§	CRIMINAL NO.:
	§	A-95-CR-193 JN
ALVARO NARVIZ-GUERRA,	§	
ET AL.	§	

ORDER

Before the Court is the Government's Motion to Dismiss Third-Party Petition Filed By Graciela Jiminez-Aragon for Failure to State a Claim, Or Alternatively, for Summary Judgment filed June 13, 1997, Answer of Claimant, Graciela Jiminez-Aragon to the Motion of Plaintiff, United States of America to Dismiss the Third Party Petition (Clerk's Doc. No. 303) filed July 3, 1997, Graciela Jiminez-Aragon's First Amended Answer filed July 8, 1997, and the Government's Reply (Clerk's Doc. No. 308) filed July 18, 1997. Upon review of the Government's Motion, Claimant's Amended Answer, the Government's Reply, the applicable legal authorities, and the entire case file, the Court enters the following Order.

The alleged right, title, and legal interest of Graciela Jiminez-Aragon (hereafter referred to as Aragon) in a piece of real property, known as the Las Moras Ranch, is the subject of this ancillary litigation. The Las Moras Ranch was subject to a Preliminary Judgment of Forfeiture and Order for Seizure issued by this Court on December 11, 1997. That Order forfeited any right, title and interest of Defendants Alvaro Narviz-Guerra and Larry Austin Grant in the ranch pursuant to Title 21 U.S.C. § 853 and Title 18 U.S.C. § 982.

Appendix F

On October 16, 1997, a Second Superseding Indictment was issued against Defendants Narviz-Guerra, and Garcia-Velazquez. Defendant Alvaro Narviz-Guerra was charged with violations of Title 21 U.S.C. §§841, 846, and 848 and Title 18 U.S.C. § 1956. Defendant Larry Grant was charged with violations of Title 21 U.S.C. §§ 841, 846 and Title 18 U.S.C. § 1956. Francisco Garcia-Velazquez was charged with violating Title 18 U.S.C. § 1956. Mr. Garcia-Velazquez is currently a fugitive from justice. The Second Superseding Indictment included the Government's Demand for Forfieture of the Las Moras Ranch.

Count Two of the Second Superseding Indictment addressed the Las Moras Ranch.

Count Two alleged that:

> In about February, 1991 Defendants selected for purchase property bordering the Rio Grande River in Maverick County, Texas known as the "Las Moras Ranch". In March, 1991 a contract for the sale of the Las Moras Ranch was placed in the name of a "nominee", Francisco Garcia-Velazquez, in order to disguise the true ownership. Subsequently, over the next two years, in excess of $848,000 in U.S. dollars were imported from Mexico by Defendants and deposited into the Unites States bank accounts of Fred Forster, the seller of the ranch. [T]he ranch property, under the oversight of defendants, was utilized as a crossing point for marijuana being smuggled from Mexico. The marijuana was then stored at the ranch and staged for ultimate distribution to several Texas cities. From 1992 to 1995, Defendants utilized the property to facilitate the illicit smuggling of marijuana from Mexico to the United States.

See Second Superseding Indictment, filed October 16, 1996 in Criminal No. A-95-CR-193-JN. On December 10, 1996, the jury found

Defendants Narviz-Guerra and Grant guilty on all counts and returned Forfeiture Special Verdicts with regard to the Las Moras Ranch.

The evidence produced at the criminal trial indicated that Fred Forster, the seller of the Las Moras Ranch, negotiated the terms of the sale with Defendant Narviz-Guerra. Narviz-Guerra came up with the schedule of payments. Garcia-Velazquez was only identified to Forster shortly before that ranch was sold. Narviz-Guerra handled any questions or disputes over the ranch with Mr. Forster. There was further evidence at trial that defendants Grant and Narviz-Guerra represented themselves as the "true owners" of the ranch and that Garcia-Velazquez held the ranch in name only. There was also testimony from a David Powell, who had loaded marijuana off the ranch in March 1995. Mr. Powell testified that he was told that the people who owned the marijuana also owned the ranch. Powell testified that he received several loads of marijuana from the Las Moras Ranch in April and May of 1995. The evidence at trial also showed that Narviz-Guerra exercised dominion and control over the ranch.

The jury found from a preponderance of the evidence that defendants Narviz-Guerra and Grant had a right, title, and interest in the Las Moras ranch. The jury also found from a preponderance of the evidence that the ranch was property traceable to the money laundering violations as set forth in Count Two of the Second Superseding Indictment. The jury further found that the ranch was property derived from proceeds obtained by Defendant Narviz-Guerra in violation of Title 21 U.S.C. §§846, 848, and 841(a)(1). The jury also found that the Las Moras Ranch constituted Narviz-Guerra's property used to facilitate the commission of violations of Title 21 U.S.C. §§ 846, 848, and 841(a)(1). The jury further found that Defendant Narviz-Guerra had an interest in, claim against, and property or contractual right affording a source of control over the property known as the Las Moras Ranch. The jury returned similar verdicts with respect to Defendant Grant's interest in the Las Moras Ranch.

The Preliminary Judgment of Forfeiture issued by this Court

ordered that proper notice be given to any and all parties which may have an interest in the Las Moras Ranch. On February 7, 1997, Graciela Jiminez-Aragon filed a Third Party Petition in opposition to the forfeiture of the Las Moras Ranch. Petitioner claims that she has legal, right, title and interest in the ranch that is and was superior to that of Defendants Narviz-Guerra and Grant. Petitioner requested a hearing to determine her interest in the ranch pursuant to Title 21 U.S.C. § 853(n)(2).

The criminal forfeiture of this real property is governed by Title 21 U.S.C. § 853(n)(6). That statute provides third parties who claim an interest in the subject property two grounds for relief:

> If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--
>
> > (A) the petitioner has a legal right, title, or interest in the property, and such right, title or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
> >
> > (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

> the court shall amend the order of forfeiture in accordance with its determination.

Title 21 U.S.C. § 853(n)(6).

Jiminez-Aragon alleges that Defendants Grant and Narviz-Guerra never had an ownership interest in the propety. Petitioner claims that her father, Jaime Alberto Jiminez-Azcona, was the true owner of the ranch. Mr. Jiminez-Azcona died on April 12, 1994. Petitioner's mother, Graciela Del Carmen Aragon Mestas, died on July 14, 1994. Petitioner claims to have inherited the ranch upon the death of her mother.

Petitioner claims that her father wanted to purchase the ranch for his cattle business. She alleges that her father put the ranch in the name of her uncle, Francisco Garcia-Velazquez. Petitioner asserts that Garcia-Velazquez was merely a straw-owner for her father. She claims that Defendant Narviz-Guerra merely sreved as a translator on her father's behalf. Petitioner further alleges that Garcia-Velazquez deeded the ranch to her on May 2, 1995. Petitioner claims to have exercised dominion and control over the ranch since May 2, 1995.

The Government claims that Petitioner lacks standing to assert an interest in the ranch. The Government has shown that Francisco Garcia-Velazquez was a straw titleholder for Defendants Narviz-Guerra and Grant. Petitioner claims that Garcia-Velazquez was actually a straw titleholder on behalf of her father and that a resulting trust arose. Petitioner has submitted no competent evidence to prove that Garcia-Velazquez was not a straw titleholder. Petitioner has also failed to present competent evidence that her father or Garcia-Velazquez ever had a financial stake in or dominion and control over the ranch. The Government has raised the objection that Petitioner has provided the Court with nothing more than hearsay in her affidavit. The Court sustains the Government's objection. The Court will not consider any inadmissable hearsay in its review of the Government's Motion to Dismiss and Alternative Motion for Summary Judgment.

Appendix F

The Government has moved to dismiss Jiminez-Aragon's Third-Party Petition. Federal Rule of Civil Procedure 12(b)(6) authorizes the dismissal of a case for failure to state a claim upon which relief can be granted. A complaint should be dismissed when it "appear[s] to a certainty that the plaintiffs can prove no set of facts in support of their claims that would entitle them to relief." Fee v. Herndon, 900 F.2d 804, 807 (5th Cir.), cert. denied, 498 U.S. 908, 111 S.Ct. 279 (1990). The Court "may not go outside the pleadings and must accept all well-pleaded facts as true, viewing them most favorably to the plaintiffs." Id.; Rubenstein v. Collins, 20 F.3d 160, 166 (5th Cir. 1994) ("For the purposes of Rule 12(b)(6), we accept as true all well-pleaded allegations in the complaint and we construe those allegations in the light most favorable to the plaintiff."). "[T]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir.1982), cert. denied, 459 U.S. 1105, 103 S.Ct. 729 (1983).

Petitioner must establish standing to be able to recover the property. If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the Court may dismiss the petition without providing a hearing. United States v. BCCI Holdings (Luxembourg), S.A., 956 F.Supp. 1, 5 (D.D.C.1996). The Fifth Circuit has indicated in a civil forfeiture proceeding that propety subject to forfeiture may be forfeited without any showing by the government that it is subject to forfeiture if a claimant is unable or unwilling to provide evidence supporting his assertion of an interest in the property sufficient to establish standing. U.S. v. $321,470.00 U.S. Currency, 874 F.2d 298, 303 (5th Cir. 1989).

Possession of mere legal title by one who does not exercise dominion and control over the propety is insufficient even to establish standing to challenge a forfeiture. United States v. Vacant Land Located at 10th St. and Challenger Way, 15 F.3d 128, 130 (9th Cir. 1993); U.S. v. Contents of Accounts Nos. 3034504504 & 14407143, 971 F.2d 974, 985 (3rd Cir. 1992), cert. denied Friko v. United States, 507 U.S. 985, 113 S.Ct. 1580 (1993). Legal title is not enough to show

standing if evidence is submitted which indicates that the claimant is no more than a nominal owner. United States v. Premises Known as 526 Liscum Drive, 866 F.2d 213, 216-17 (6th Cir. 1988).

The evidence before the Court shows that Garcia-Velazquez was a straw holderfor Defendants Narviz-Guerra and Grant. Garcia-Velazquez could not properly convey title to anyone. Petitioner has produced no competent evidence to show that her interest, if any, is nothing more than that of a straw titleholder once removed. Accordingly, this Court finds that Petitioner lacks standing to challenge the forfeiture of the Las Moras Ranch. The Court will dismiss Graciela Jiminez-Aragon's Third Party Petition pursuant to Federal Rule of Civil Procedure 12(b)(6).

The Government has moved alternatively, for summary judgment. A district court will, on a motion for summary judgment, render judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Singh v. Shoney's, 64 F.2d 217, 218 (5th Cir.1995); Int'l. Shortstop, Inc. v. Rally Inc., 939 F.2d 1257, 1263 (5th Cir.1991), cert. denied, 112 S.Ct. 936 (1992). When a motion for summary judgment is made and supported, an adverse party may not rest upon mere allegations or denials but must set forth specific facts showing there is a genuine issue for trial. Ray v. Tandem Computers, Inc., 63 f.3d 429, 433 (5th Cir. 1995); Fed. R.Civ.P. 56.

Both movant and non-movant bear burdens of proof in the summary judgment process. Celotex Crop. v Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). The movant with the burden of proof at trial must establish every element of its claim or affirmative defense. Id. At 322, 106 S.Ct. At 2552. In so doint, the moving party without the burden of proof need only point to the absence of evidence on an essential element of the non-movant's claims or affirmative defenses. Id. At 323-24, 106 S.Ct. At 2554. At that point, the burden shifts to the non-moving party to "produce the evidence in support of its claims or affirmative defenses...designating specific facts showing that there is a genuin issue

for trial." Id. At 324, 106 S.Ct. At 2553. The non-moving party must produce "specific facts" showing a genuine issue for trial, not mere general allegations. Fed. R.Civ.P. 56(e); Tubacex v. M/V Risan, 45 F.3d 951, 954 (5th Cir. 1995). The non-movant has failed to meet this standard if its response merely shows that "there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986).

In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. The fifth Circuit has concluded "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether there is a sufficient factual dispute to permit the case togo forward, but whether a rational trier of fact could find for the non-moving party based upon the evidence before the court." James v. Sadler, 909 F.2d 834, 837 (5th Cir. 1990) (citing Matsushita, 475 U.S. at 586, 106 S.Ct. 1356). To the extent facts are undisputed, a Court may resolve the case as a matter of law. Blackwell v. Barton, 34 F.3d 298, 301 (5th Cir. 1994).

Even if Petitioner could establish standing, she has failed to produce any competent summary judgment evidence to show that she had vested legal interest in the ranch superior to that of Defendants. Petitioner admitted in her deposition that her knowledge of this situation is based upon what Garcia-Velazquez told her. Petitioner did not pay Garcia-Velazquez any money for the Las Moras Ranch. She did not pay any money to Fred Forester for the ranch. She has no personal knowledge as to where the money came from to pay Forster for the ranch.

Petitioner alleges that Garcia-Velazquez transferred the ranch to her on May 2, 1995, because it had belonged to her father. The Government contends that Garcia-Velazquez did not own the property. In drug forfeiture actions, ownership of property is determined by state law. United States v. Lester, 85 F.3d 1409, 1412 (9th Cir. 1996). Once the ownership interests are defined under state law, however, the federal

forfeiture statutes determine whether the property interests shall be forfeited to the Government. Id. at 1412.

Under Texas law, a conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land, must be in writing, and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing. See Tex. Property Code § 5.021. Upon payment of the purchase price and full performance of a contract for sale of real property, a party becomes vested with an equitable title in the land sufficient to enable him to maintain an action for trespass to try title. Brown v. Davila, 807 S.W. 2d 12, 14 (Tex. App.-Corpus Christi, 1991). In such a case, evidence must establish that a party had legal title to property. Id. A grantor cannot convey to a grantee a greater or better title than he holds. Day & Co. v. Texland Petroleum, Inc., 718 S.W.2d 384, 390 (Tex. App.--Amarillo 1986), aff'd 786 S.W.2d 667 (Tex. 1990). Accordingly, a deed conveys nothing where no title rests in the grantor. Id.

As laid out above, Garcia-Velazquez was merely a straw titleholder. On May 2, 1995, the ranch was placed in Petitioner's name by Garcia-Velazquez. The transfer was well after the ranch was used to facilitate the money laundering and marijuana smuggling by Defendants Narviz-Guerra and Grant. Those were the acts that led to the forfeiture of the ranch. Attempts by third-parties to acquire an interest after the criminal acts are committed are void unless the third party is a bona fide purchaser for value. United States v. BCCI Holdings (Luxembourg), F.Supp.__, 1997 WL 202891 (D.D.C. April 22, 1997). A third party, like Petitioner, that acquires the subject property, after the commission of the relevant criminal acts, must make a claim under section (B), or the bona fide prong of Title 21 U.S.C. § 853(n)(6).

There is no competent cummary-judgment evidence to suggest that petitioner was a bona fide purchaser. Petitioner did not buy the ranch. According to Petitioner's deposition testimony, she did not pay any money to Garcia-Velazquez or Forster. Petitioner admitted that she only paid a notary and document preparation fee. The evidence at the

criminal trial showed that Forster was paid nearly one million dollars for the Las Moras Ranch. There is no evidence that her father or mother ever paid any money to Forster for the ranch. Petitioner's father and mother never possessed title to the ranch.

The bonafide prong also requires the Petitioner to show that she was without cause to believe that the property was subject to forfeiture. Petitioner admitted in her deposition that she had conversations prior to May 1995 with a real estate broker named Florisa Cadena. Ms. cadena informed Petitioner that there were rumors that the ranch was being used to transport drugs. Prior to May 1995, Petitioner also had conversations with a Carl Pendergrass who was interested in purchasing the ranch. Mr. Pendergrass also informed petitioner of the rumors that the ranch was involved in drug trafficking. Petitioner was informed on two occasions prior to May 2, 1995 that the ranch may be inolved in drug smuggling. Petitioner had reason to know that the ranch might be subject to forfeiture prior to May 2, 1995. Petitioner has submitted no competent summary judgment evidence to this Court to show that agenuine issue of material fact exists with respect to the issues which are to be resolved by the ancillary hearing. Petitioner has submitted nothing more than hearsay without authentic documentation. Petitioner simply cannot meet the requirements of Title 21 U.S.C. § 853 (n)(6).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Government's Motion to Dismiss Third-Party Petition Filed By Graciela Jiminez-Aragon for Failure to State a Claim is hereby GRANTED and that Graciela Jiminez-Aragon's Third Party Petition is hereby DISMISSED WITH PREJUDICE pursuant to Federal Rule of Civil Procedure 12(b)(6).

ALTERNATIVEY, IT IS ORDERED, ADJUDGED AND DECREED that the Government's Motion for Summary Judgment is hereby GRANTED and that Graciela Jiminez-Aragon's Third Party Petition is hereby DENIED on the merits.

IT IS FURTHER ORDERED that the Government shall move

for a Final Order of Forfeiture which will address all of the third-party interests in this cause.

IT IS FURTHER ORDERED that the Clerk is directed to fax a copy of this Order to all counsel of record.

SIGNED AND ENTERED this 28th day of July, 1997.

/s/James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX G--SECTION 38, TEXAS PROBATE CODE

Persons Who Take Upon Intestacy

(a) **Intestate Leaving No Husband or Wife.** Where any person, having title to any estate, real, personal or mixed, shall die intestate, leaving no husband or wife, it shall descend and pass in parcenary to his kindred, male and female, in the following course:

1. To his children and their descendants.

APPENDIX H--T.J.P.3d. § 164, VOL. 72

In general

A resulting trust applies by operation of law when title is conveyed to one person but the purchase price is paid by another. In other words, where one buys property with the funds of another and takes the deed in his or her own name, a trust results in favor of the person whose money was employed in making the purchase.